(10)

No. 90-1947

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN K. YEE AND IRENE S. YEE, H.N. AND FRANCES C. BERGER FOUNDATION, MOUNTAIN SHADOWS MOBILE HOME ESTATES, RICHARD C. KUEBLER, d/b/a MOONGLOW MOBILE HOME PARK, CASA DE AMIGOS MOBILE HOME ESTATE, VISTA VERDE, LTD., IMPERIAL ESCONDIDO MOBILE ESTATES and MILDRED D. TACEY,

Petitioners,

v.

THE CITY OF ESCONDIDO,

Respondent.

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS SUBMITTED BY MANUFACTURED HOUSING ASSOCIATION IN NEW JERSEY, INC.

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November 27, 1991

QUESTIONS PRESENTED

I. Is there a physical taking in contravention of petitioners' Fifth Amendment Rights as a result of the combination of the mobile home park tenancy protection laws and rent control, which gives tenants a permanent estate in the land of the landlord which can be sold to third parties?

II. Does the vacancy control aspect of mobile home park rent control substantially advance a state interest? Is vacancy control a violation of petitioner's Due Process rights?

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INTRODUCTION

This brief is submitted on behalf of Manufactured Housing Association in New Jersey, Inc., as Amicus Curiae in support of petitioners' case on appeal. It is alleged that in California, mobile home park rent control, combined with mobile home park tenancy protection,[1] transfers an estate in land from landlord to tenant, without compensation, in violation of petitioners' Fifth Amendment rights. That same taking is occurring in New Jersey's rent controlled communities.

[1] By "tenancy protection" we refer not only to the legislation which prohibits eviction, which is not in issue considered by itself. Here, the "protection" also gives the tenant the right to remain in possession himself *and* transfer possession to another third party with little input or discretion on the part of the landowner.

INTEREST OF *AMICUS CURIAE*

The Manufactured Housing Association in New Jersey, Inc. ("N.J.M.H.A.") is a non-profit organization representing the interests of the mobile (manufactured) home industry, including manufacturers, distributors, suppliers, insurers and financiers. Mobile (manufactured) home park owners comprise a majority of the Association's membership. This includes 148 mobile home parks (land-lease communities), including approximately 18,459 rental mobile home spaces. Rent control is prevalent in New Jersey's mobile home park communities. Tenancy protection laws exist statewide in New Jersey. The N.J.M.H.A., acting for its members, believes the issues presented to this Court by *Yee v. City of Escondido* are identical to issues being litigated presently by its members in New Jersey's State and Federal Courts.

SUMMARY OF ARGUMENT

I.

THE COMBINATION OF STATE TENANCY PROTECTION STATUTES AND LOCAL RENT CONTROL, RESULTS IN A PHYSICAL TAKING VIOLATIVE OF PETITIONERS' FIFTH AMENDMENT RIGHTS.

This case deals with the violation of petitioners' constitutional rights that occur when the City of Escondido Rent Control Ordinance (Escondido Municipal Code, Article V, Sections 29-101 through 29-108) is superimposed onto the California Mobilehome Residency Law (Cal. Civ. Code Section 798 et seq.).

This is not a case challenging the legitimacy of rent control. This is not a case challenging the legitimacy of state anti-eviction acts. Rather, this case deals with what happens when the two are combined; the effect or the interplay of continuing rent control and tenancy protection acts and their impact on the property rights of the

owner of a mobile home park. The issue is the absence of vacancy decontrol, which would, if made part of the rent control ordinance, eliminate the effects of rent control when the tenancy protection scheme is relied upon by the tenant.

It is argued that the tenancy protection law here in issue, i.e., that which allows the departing mobile home park tenant the right to sell his personal property on a designated part of the landlord's real estate, when combined with rent control regulations which prohibit rent increases upon resale, results in a taking. The tenant has been given certain possessory rights in the landlord's property. The right to sell his home on-site transfers the possessory right permanently to the tenant. It transfers to the tenant the right to devise an interest in the land. The right to sell it to a third party at controlled rates creates an artificial premium. The tenant is given rights similar to those of the landowner, i.e., the right to choose new occupants, and the tenant can now sell that right, or collect rent, capitalized as an artificial part of his mobile home sale price, as a result.

At issue are the bundle of rights afforded the owner of property under our Constitution, and how that bundle of rights has been severed; how a tenant in a mobile home park acquires a right in the landlord's property extending beyond the tenant's temporary right to possession.

This case deals with the inverse condemnation of property, the physical invasion and taking of property, and property rights, theretofore vested in the landlord, and now, by virtue of the laws in question, vested in the tenant. Finally, at issue are the combined effects of governmental mandate--a state statute, *and* a local rent control ordinance which impact so as to deprive the owner of the property of some of his constitutionally protected bundle of rights.

This taking is not justified by the substantial advancement of any State interest, nor is it paid for by any compensation.

II.

TRANSFERRING AN ALIENABLE POSSESSORY INTEREST IN A MOBILE HOME PARK WHICH CAN BE SOLD BY A TENANT IS NOT RATIONALLY RELATED TO THE VALID STATE INTERESTS IN RENT CONTROL OR TENANCY PROTECTION, AND THEREFORE, IS VIOLATIVE OF DUE PROCESS.

There may be a valid public purpose behind rent control, i.e., maintenance of low-cost housing and avoiding the forced dislocation of low-income residents. There may be a valid public purpose in permitting the sale of mobile homes on-site in an existing mobile home park. A tenant's home on-site is worth more than off-site. There is no legitimate State interest in allowing tenants to charge artificially high resale prices (which defeats the purpose of maintaining low-cost housing) to incoming tenants, which is attributable to controlled rents. That only serves to change the beneficiary of the value of the scarce locational value of the mobile home space. This does not substantially advance a State interest, has no rational nexus to the State or Municipal scheme in question, and therefore, violates the landlord's Due Process rights.

ARGUMENT

I.

THE RENT CONTROL REGULATION OF THE CITY OF ESCONDIDO COMBINED WITH CALIFORNIA'S MOBILE HOME RESIDENCY LAW RESULTS IN A PHYSICAL TAKING OF PETITIONERS' PROPERTY WITHOUT JUSTIFICATION OR COMPENSATION.

A. Introduction

Petitioner owns and operates a manufactured housing community, commonly known as a mobile home park

("Park"). The residents of the Park own their individual mobile homes, and rent spaces from the Petitioner. "Mobile homes are mobile only in the sense that they are not permanently anchored to a foundation. However, many mobile homes have no wheels and bear no other close resemblance to a motor vehicle." *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1273 (9th Cir. 1987) *cert. denied*, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988) "While tenants are free to remove their mobile homes when they move, in practice they rarely do so . . . Tenants typically sell their homes to buyers who then succeed them as tenants of the mobile home park." *Id.* at 1273.

Petitioner as a Park owner has been impacted by two separate and distinct governmental enactments. Neither of these enactments reference the other, neither take into account the effect one has upon the other, or collectively upon the owner as landlord. The gravamen of the Petitioner's Complaint is the *collective* effect of the two. Neither enactment, working independently of the other causes the taking or condemnation to occur as complained of. Rather, the combined effect, the imposition of local rent control upon tenancy protection laws, triggers the inverse condemnation.

The Escondido Municipal Code, Article V, §29-103 provides that an owner cannot increase rents without Rent Review Board approval.

Sections 29-107 and 29-108 of the Municipal Code provide that a tenant may refuse to pay any rent in excess of the maximum rent permitted by Article V, and that any such "excess" rent is illegal.

Section 29-106 of the City's Code provides that a tenancy which is not subject to the provisions of the State mobile home residency law shall not be terminated, except for one or more of the specifically authorized reasons.

The California Mobilehome Residency Law (Cal. Civ. Code §798 et seq. (West's 1982)), speficially §§798.55, 798.56 & 798.74, protects tenants from eviction from a mobile home park and requires the approval of a purchaser of a mobile home that will remain in the park if the purchaser has the financial ability to pay the rent and does not have a prior tenancy history indicating he or she will not comply with the rules and regulations of the park.

The effect of the California Mobilehome Residence Law is that a Park owner is prohibited from having tenants remove mobile homes when they decide to leave the mobile home park. They can sell it and leave it on the landlord's scarce mobile home space. Further, the Park owner, subject to financial review of the buyer of the home, must accept a new tenant who will now reside in the mobile home of the previous tenant. The effect of the Municipal Code is to prevent the Park owner from raising rent except as may be approved by the Rental Review Board of Escondido.

The same combination of State Law, *N.J.S.A.* 2A:18-61.1 and *N.J.S.A.* 46:8C-1, *et seq.*, and municipal rent control ordinance exist in New Jersey, in numerous municipalities. *E.g., Pinewood Estates v. Barnegat Tp.*, 898 F.2d 347 (3rd Cir. 1990).

No allowance is permitted to adjust or raise the rent when the new tenant takes occupancy of the mobile home, hence the term "vacancy control". The new tenant simply "steps into the shoes" of the previous tenant. The Petitioner asserts that since no right of "vacancy decontrol" exists, a departing tenant is paid a measurable premium, in excess of the amount paid for mobile homes in non-rent controlled Parks, for the same or similar mobile home, or in excess of the market value of the home, as measured by the Kelley Blue Book for mobile homes. See *Azul Pacifico u City of Los Angeles*, 740 F.Supp. 772,

778 (C.D. Cal. 1990), aff'd., ___ F.2d ___ (9th Cir., No. 90-55853 and 90-56066, November 1, 1991). The Petitioner further asserts that the premium is derived from the owner's bundle of property rights, that this right has been severed, and by effect of dual government mandate, the owner's property has been taken and turned over to the tenant, and the tenant's successors. The property right in question is the right to exclude others. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831, 107 S.Ct. 3141, 3145, 97 L.Ed.2d 677 (1987). It also involves the right to devise property. *Hodel v. Irving*, 481 U.S. 704, 716, 107 S.Ct. 2083, 2084, 69 L.Ed.2d 1 (1981). The tenant has been given a superiority of right in this regard over the right of the landowner. See, *Kaiser-Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). The property is now the subject of a commonality of use and profit. It is a physical presence, not acquiesced in by the landlord, which has been transferred to the tenant, including the right to use and dispose of. It is a physical taking.

The effect is a deprivation of property, without due process of law, for public use, and without just compensation, a violation of the Fifth Amendment to the United States Constitution. (The "Takings Clause," U.S. Const. Amend. V.)

The fact pattern as exists in *Yee*, is practically indistinguishable from other mobile home parks in California, as well as nationwide, where the duality of local rent control and state mobile home tenancy protection statutes are in effect.

In *Pinewood Estates of Michigan v. Township of Barnegat*, 898 F.2d 347, 352 (3rd Cir. 1990), Judge Greenberg succinctly summarized the factual pattern that exists in New Jersey:

". . . Here, there has been a permanent transfer of the appellants' possessory interests to each tenant to occupy a rent controlled pad. Thus, although the interest belongs to the appellants, the landlords, the effect of the law is to transfer the interest, without compensation, from the landlords to the tenants. Accordingly, a tenant may, by determining the purchaser of his mobile home, select the new tenant for the park and command a premium for the alienation of the right to occupy the pad at a controlled rent to the complete exclusion of the appellants. The combined impact of the statute and the ordinance operates to deprive the appellants of their possessory interest in the pad permanently.

The existence of "vacancy control" is dispositive. Because of it, the possessory interest can be sold by the tenant or the "estate" (the valuable right to use and dispose of the interest in the land) can be transferred or devised to his family members, heirs, friends, etc. What he has to sell, above the free-market value of his mobile home, is the landlord's scarce mobile home space. With vacancy *de*control, the landlord could realize its value in higher rent. The higher rent is being paid either way but without vacancy decontrol it is paid to the departing tenant who capitalizes it in the inflated resale value of his personal property, i.e., his mobile home.

The premium, derived from the Park owner's property interest, has an established market and market value. The market value has been quantified in those cases preceding *Yee*, including *Hall, supra*, and *Azul Pacifico, supra*.

The owner of Pinewood Estates, now proceeding with their trial on remand before the District Court in New Jersey, has submitted an expert report, utilizing the same expert as was used in *Hall* and *Azul Pacifico*. The report confirms a phenomenon, not limited to California, that "there is an identifiable differential or 'premium' paid for

mobile homes in Rent-controlled mobile home parks", *The Effects of Rent Control on Market Sales Price of Mobile Homes in Place in Mobile Home Parks in Selected New Jersey Communities*, May 24, 1991, by Dr. William N. Kinnard, Jr., SREA, MAI, CRE, ASA, Page 41. See also Hirsch & Hirsch, "Legal-Economic Analysis of Rent Controls in a Mobile Home Park Context: Placement Values and Vacancy Decontrol", 35 U.C.L.A. L.Rev. 399 (1988). In the report completed by Dr. Kinnard, the indicated typical or average amount of measurable differential or "premium" is an increase of $11,000 per mobile home, or $8.25 per square foot of mobile home living area. This represents approximately 25% of the price paid, or 19% of sales price per square foot of living area. "This measurable differential is indeed a systematic market phenomenon which has virtually no probability of having occurred by chance. The calculated probabilities of this having been a chance occurrence are less than 1 in 1,000." *Id.* at 41.

This effect is not evident in mobile home parks where residency laws exist in the absence of rent control. This effect is not evident in apartment rentals. As the court noted in *Pinewood Estates, supra* at 354. The effect was found to exist in the *Pinewood* case because of the provisions of the Barnegat Township Rent Control Ordinance.[2] The Township of Barnegat, New Jersey, has adopted a rent leveling ordinance, Ordinance No. 1977-19, which controls mobile home space rentals. Section 64.2 of the Barnegat Ordinance establishes a formula for determination of rent. It is set forth in detail in the appendix.

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[2] The Township of Barnegat, New Jersey has adopted a rent leveling ordinance. Ordinance No. 1977-19, which controls mobile home space rentals. Section 64.2 of the Barnegat Ordinance establishes a formula for determination of rent. It is set forth in detail in the appendix, at p. 1a.

Thus, the effect of the two enactments, local rent control and tenancy protection laws have a unique legal impact on the owner of a mobile home park. Others have the right to use the property with little say from the landlord, and existing tenants have the right to charge for it. As Judge Greenberg called it in *Pinewood,* it is the ". . . uncompensated creation of interests . . ." in land for the benefit of the tenants. It is actually a "transfer," as opposed to a creation, since the landowner had the right prior to the enactment of the challenged regulations. *Pinewood, supra,* at 355.

B. Treatment of the *Yee* Taking Claim as a Physical Taking Is Consistent with This Court's Prior Cases.

1. The Requisites for a Physical Taking Are Present in *Yee.*

As explained in *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982), the distinction between the two types of taking lies in the fact that "a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause", *Id.* at 433, 102 S.Ct. at 3171. Indeed, "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine", at 432, and "without regard to the public interest that it may serve", *Id.* at 426.

> "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it'. *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed 311 (1945). To the extent that the government permanently occupies physical property, it effectively destroys each of these rights." *Loretto, supra,* at 435, 102 S.Ct. at 3176.

It is of no moment that the government has not taken possession, but has coerced the possession by a third party instead. *Id.* at 432, 102 S.Ct. at 3174, n.9; *Nollan, supra,* at 832, 107 S.Ct. at 3145.

Here the court is faced with the unique combination of the transfer to a tenant of all of the right to exclude others, *Loretto, supra,* at 435, 102 S.Ct. at 3175, *Nollan, supra,* at 832, 107 S.Ct. at 3145, *Kaiser-Aetna, supra,* at 179-80, 100 S.Ct. at 392-93, and the right to devise it. *Hodel v. Irving,* 481 U.S. at 717-718, 107 S.Ct. at 2084. The tenant can also, and often does, sell it. Thus, as a result of the permanent physical occupation, clothed with all indicia and benefits of ownership above, there is not only a transfer of an alienable interest in the land to the tenant, but the tenant is clearly being compensated as a result, not the landowner who is deprived of his rights of alienation.

In reviewing rent control cases, this court has consistently stated that "statutes regulating the economic relations of landlord and tenants are not *per se* takings", *FCC v. Florida Power*, 480 U.S. 245, 251, 107 S.Ct. 1107, 1112, 94 L.Ed.2d 282 (1987), and draws a distinction between the invitation given to a lessee and an interloper with a government license. The former, where a lessee is involved, is typically reviewed under regulatory taking criteria. Only the latter, where an interloper with a government license is involved, has been reviewed as physical possession or physical taking cases.

Thus, in order to establish a physical taking case, particularly where rent control is involved, it would appear that a Plaintiff must evidence a combination of physical occupation, that is permanent, authorized by government, without regard to the public interests that it may

serve (see *Loretto*, at 434-35, 102 S.Ct. at 3176), where such occupation is by an interloper or third party, and lastly, that is not consensual in nature, *Florida Power, supra*, at 252, 107 S.Ct. at 1112.

2. The Facts in *Yee* Have Never Been Considered by This Court.

Yee's cause of action evidences each of the requisite factors for a physical taking, thus making it ripe for this court's determination. Prior cases have been unable to reach the merits of this issue due to procedural defects, or because the requisite factors, identified previously, were missing.

In *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988), the court was asked to review the rent control ordinance enacted by the City of San Jose. A landlord seeking a rent increase pursuant to its terms would be required, upon tenant objection, to submit the increase request to review by a mediation hearing officer. No tenancy protection law was involved.

The Ordinance sets forth a number of factors to be considered by the hearing officer in making this determination, including "the hardship to a tenant." *Id.* at 4, 108 S.Ct. at 853. Pennell asserted that the factor of the "hardship to a tenant" accomplished "a transfer of the landlord's property to individual hardship tenants;" *Id.* at 9, that "the Ordinance forces private individuals to shoulder the 'public' burden of subsidizing their poor tenants' housing", *Id.* at 9. This court found that the claim was premature, as the suspect provision of the ordinance, allowing the hardship of a tenant to be considered, had not then actually been considered by a Mediation Hearing Officer. *Id.* at 4, 108 S.Ct. at 856.

Of interest, Justice Scalia, with whom Justice O'Connor joined, concurring in part, and dissenting in part, asserted that he would find that consideration of tenant hardship effects a taking of property without just compensation. The dissent acknowledged that the City may constitutionally set a 'reasonable rent' according to the statutory minimum. "Appellants only claim is that reduction of a rent increase below what would otherwise be a 'reasonable rent' under this scheme may not, consistently with the Constitution, be based on consideration of the seventh factor—the hardship to the tenant as defined in §5703.29. I think they are right." *Id.* at 21, 108 S.Ct. at 862. He found no justification for imposing this venerable societal aim on one unrelated segment of society, i.e., landlords.

In *Fresh Pond Shopping Center, Inc. v. Rent Control Board of Cambridge*, 464 U.S. 875, 104 S.Ct. 218, 78 L.Ed.2d 215 (1983) the Court dismissed the case for want of a substantial federal question. At issue was a tenancy protection statute. The tenants' rights could not be transferred to another tenant in that case. The possessory interest could not be disposed of by the tenant. No issue of rent control (i.e., rate regulation) was involved either. That case is inapposite.

In *Fresh Pond*, a landlord's right to personally occupy a rental unit was circumscribed both by the Rent Control Board of Cambridge and an enabling state residency protection statute. The local Ordinance, according to Justice Rehnquist, in his dissenting opinion "delegates virtually unfettered discretion to the Board to determine whether to grant a removal permit." *Id.* at 876, 104 S.Ct. at 219.

Justice Rehnquist noted that "the *combined* effect of the limitations imposed by the state enabling statute and Ordinance 926 is to deny appellant use of his property." . . . *Id.* "In my view this deprives appellant of the use of its property in a manner closely analogous to a perma-

nent physical invasion, like that involved in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) . . . . *Id.* at 877, 104 S.Ct. at 219. "As the Cambridge ordinance operates in this case, I fail to see how it works anything but a physical occupation of appellant's property. First, appellant's right to evict the tenant was limited by state law to two circumstances: occupation of the rental unit by the owner or certain members of his family, or demolition. The first of these rights is not available to appellant. The second, demolition, is controlled by Cambridge Ordinance 926, and under the administration of that ordinance by the Cambridge Rent Control Board, appellant has been denied the right to remove the unit from the housing market by demolition. It is not certain whether the Rent Control Board would, if the tenant decided to leave, determine that a demolition permit should issue, but it is clear that until the tenant decides to leave of his own volition, appellant is unable to possess the property." *Id.*

Of importance to Justice Rehnquist in his analysis there was the fact that the power to end or terminate the physical invasion was under the control of a private party.

In *Fresh Pond*, Justice Rehnquist first noted how the *combined* effect of the state residency statute and local residency ordinance effected a taking. However, *Fresh Pond* did not consider the *combined* effect of a tenancy protection statute *and* a local ordinance effecting *rents.* Nor did it consider a rent control scheme. Thus, the dismissal in *Fresh Pond* for want of substantial federal question is not dispositive of the *Yee* case, where the combined effect of rent control, and tenancy protection is directly in issue.

C. *Florida Power* Has Been Incorrectly Applied by Respondent, City of Escondido; It Is Inapposite.

The Respondent, City of Escondido, has raised the case of *F.C.C. v. Florida Power, supra*, as somehow being

dispositive of *Yee*. Respondent, further asserts that because the Court of Appeals in *Pinewood Estates*, failed to take into account *Florida Power*, their methodology was defective, and the decision flawed. *Florida Power*, however, does not present an analogous situation to *Yee*. Nor is it related to the issues at hand. Here, the combined effect of rent regulation and tenancy protection is in issue, and it is asserted that this unique combination effects a physical taking. The nature of this type of claim was not only not considered in *Florida Power*, but was specifically noted as being reserved by the Court and hence not adjudicated. *Id.* at 252, 107 S.Ct. at 1112, n.6.

The Court in *Florida Power*, in reviewing the facts, noted the Federal Legislation there under review was a response to complaints from cable operators regarding exploitation by utility companies. As a result of the passage of the law, where a state failed to regulate rates charged by a utility to a cable company, the cable company could seek relief from alleged overcharging before the F.C.C. It could regulate the rates, terms and conditions for pole attachments.

At issue was rate setting, which is equated to rent control. The *combined effect* of rent control and tenancy protection was not in issue.

Respondent forcefully argues that the Landlord's consent to lease, in the first instance, was the key to *Florida Power*, and thus represents binding precedent. This Court recognized a distinction between *FCC* and *Loretto*: "But it is the invitation, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license. We conclude that the Court of Appeals erred in applying the *per se* rule of *Loretto* to the Pole Attachments Act." *Id.* at 252, 107 S.Ct. at 1112.

The Court left open the precise issue now being raised by *Yee* by not deciding whether a taking occurred where the rights to enter into, renew, or refrain from terminating were not permitted, as was the case under review. *Id.*, n.6.

Respondent would further argue, that the dispositive issue in *Florida Power* was the court's admonition that consent, or the "invitation" to let, excused any Takings argument; that the mobile home park owner in *Yee* has consented to leasing for residential purposes, and once such consent was given, its regulation is not coercive governmental action.

As in many states (including New Jersey, *N.J.S.A.* 2A:18-61.1, *et seq.*), the California tenancy protection statute affords an existing residential tenant the right to continue to let, and eviction is limited to good cause circumscribed by statute. Additionally, because of the unique character of mobile homes, and because of the difficulty of their being moved, mobile home protection statutes have been enacted allowing an existing tenant to sell his mobile home in place to a new tenant. A landlord is typically limited to approving the financial ability of the tenant. Combined with the above enactments, local ordinances have been adopted limiting the rents that a Park owner can impose (City of Escondido Municipal Code, *supra*). No vacancy decontrol is afforded in Escondido's Ordinance, or in similar ordinances reviewed by the courts in *Hall*, *Azul Pacifico*, and *Pinewood Estates*, *supra*.

While Respondent might argue that the landlord in *Yee* consented to the residential letting, consented to both the state tenancy protection law and mobile home protection law, even consented to letting *while* the regulatory limitation of rent control was in effect, no court has *ever* given credibility to the proposition that a landlord has, by such conduct, consented to a tenant's being able to sell the possessory interest, or to the tenant's

successors in interest occupying the property indefinitely, and in perpetuity, and without regard to the effect on the landlord, and his possessory interest in his property. *Florida Power* specifically limited its decision to the facts before it, and did not decide what would happen, if the FCC required utilities "over objection" to enter into, renew, or refrain from the termination of pole attachment agreements. *Id.* at 252, 107 S.Ct. at 1112, n.6. Yet, that is the precise issue in *Yee*. This landlord cannot terminate a lease (except for statutorily defined good cause), nor can he refrain from entering into a new lease with a tenant's successor in interest (except for financial inability of the new tenant), or such succeeding tenants' successors. Additionally, he cannot charge a fair market rent regardless of who the tenant is, now or in the future, without permission from the Escondido rent control board. This court should not hold that a landlord has consented to the combined effects noted above, to persons not yet in being or to the sale of a possessory interest in his property by a third party, on a permanent or continuing basis.

The *Pinewood Estates* court dealt directly with this issue. Referring to a predecessor case of *Troy Ltd. v. Renna*, 727 F.2d 287 (3rd Cir. 1984), the Court of Appeals noted that it had upheld the New Jersey Senior Citizens and Disabled Protected Tenancy Act as a valid regulatory taking, 898 F.2d at 356. The *Pinewood Estates* Court said that the combination of tenancy protection schemes such as that involved in *Yee* and rent control were distinguishable from senior citizen occupancy protection vis-a-vis landlord's rights to convert apartments to condominiums, because the latter regulatory scheme involved no permanency, no public use, and the tenant there had no right to choose the new occupant. The tenancy involved in *Troy* did not acquire the right to transfer possession for consideration. Judge

Greenberg, writing for the court in *Pinewood* pointed out, at 898 F.2d, p. 357:

> Nor is there any tension between this case and the legion of the cases upholding apartment rent control. Two significant differences exist between mobile home regulations now subject to the New Jersey rent control statute and the Barnegat ordinance and the typical urban rent control. First in urban apartment rent control it is the landlord who chooses, selects, and rents to the new tenants. No other party can sell the right to occupy the landlord's premises. Second, the tenant cannot occupy in perpetuity. Thus, the tenant does not acquire an inheritable right; see *Troy*, 727 F.2d at 301.

The Third Circuit's rationale should be adopted by this Court.

To carry this matter to the nth degree, even if it can be argued by Respondent, City of Escondido, that the Yees consented to the letting, with knowledge of state tenancy protection, mobile home tenant protection, and with rent control applicable to successive generations of tenants, it is fanciful to imagine that the landlord consented to a severance of its property rights, depositing said right to exclude, devise and sell possession permanently in the tenant and the tenant's chosen successors.

A further argument, relating to consent is made by Respondent, i.e., the landlord may terminate his "consent," and evict the tenant from his lands, if he decides to devote the land occupied by the tenant to a different use. This is not a realistic possibility. For example, New Jersey permits the eviction of apartment and mobile home tenants where an "owner seeks to retire permanently the residential building or the mobile home park from residential use or use as a mobile home park." *N.J.S.A.* 2A:18-61.1.

However, alternate residential uses are not justification for closing a park. If a commercial use is chosen, the landlord must secure all developmental approvals before eviction. *N.J.S.A.* 2A:18-61.1(b). The landlord must give an eighteen-month Notice to Quit. *N.J.S.A.* 2A:18-61.2(d). If the town, wishing to avoid dislocation of the residents of the mobile home park, zones the land for mobile home use, the commercial development approvals may never be available and the ability to close the park may never exist. In New Jersey it is not a realistic possibility.

This point was recognized in *Loretto*, 458 U.S. at 439, 102 S.Ct. at 3178, n. 17, *Hall, supra*, at 1277-1278, n. 18, and *Pinewood, supra*, at 558.

Thus, *Florida Power, supra*, simply does not deal with the issue at hand. The reliance placed thereon by the Respondent, and its challenge of the decisions in *Pinewood Estates* for not referencing or considering *Florida Power* is erroneous. Contrary to the Respondent's assertions, the issue is *not* simply rent regulation, but the *combined*, and here unique effect, of rent regulation *and* tenancy protection.

The Facts of *Yee* Are Unique, and Have Not Been Previously Considered by This Court. With no direct precedent from this Court, Judge Kozinski, in *Hall*, first comprehended the uniqueness of the *Yee* set of facts. He notes: "Plaintiffs' claim was a novel one: they argued that by giving tenants the right to a perpetual lease at a below-market rental rate, the ordinance transferred to each of them a possessory interest in the land on which their mobile home is located. According to the Halls, this interest has a market value and a market: the market for mobile homes located in mobile home parks. According to the Halls, the price of mobile homes in their park shot up dramatically after enactment of the ordinance, with many selling for above their blue book value. They claim that the substantial premium paid for in parks sub-

ject to the Santa Barbara Ordinance reflects the transfer of a valuable property right to occupy home parks at below-market rates." *Id.* at 1273, 1274.

In his opinion Judge Kozinski states:

> In effect, the tenant is given an economic interest in the land that he can use, sell or give away at his pleasure; this interest (or its monetary equivalent) is the tenant's to keep or use, whether or not he continues to be a tenant. If the Halls' allegations are proven true, it would be difficult to say that the ordinance does not transfer an interest in their land to others. *Id.* at 1276.

This is the same state of affairs in New Jersey.

D. The State Court Decisions in *Yee* Were Flawed.

The State Court in *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 274 Cal. Rptr. 551 (1990), review den. 1991 Cal. Lexis 353 (Cal. 1991) endeavored to apply the holdings in *Florida Power, supra,* and *Pennell, supra,* and its prior decision of *Oceanside Mobilehome Park Owners' Ass'n v. City of Oceanside*, 157 Cal. App. 3d 887 (1984), but did so incorrectly. By way of specific example, the court cites *Florida Power* as emphasizing the element of consent or required acquiescence by the landlord. Yet it recognized that *Florida Power* reserved on the question of the validity of a regulation which would address the utilities' right to terminate existing lease agreements. 224 Cal. App. 3d at 1358.

The *Yee* court completely fails to recognize that the loss of control over the right to "renew," not only the "right to refrain from terminating," is a key element in creating the permanency, and physical taking. As stated in *Hall* (citing *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)): "The right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause." 833 F.2d at 1276.

Moreover, the California court simply did not acknowledge that a taking could occur, independent of the issue of what constitutes fair and reasonable rents. The California Court rationalized that the Yees' complaints never alleged that the Escondido ordinance is irrational because it denied them fair and reasonable rents. 224 Cal. App. 3d at 1354. The Court concluded that without allegations regarding rents below the constitutional minimum, that they could assume the rents provided for by the ordinance were fair, and therefore, there is no taking. *Id.*

In *Hall*, the court directly countered this assertion: "The city's argument that appellants are adequately compensated by the rents they receive is irrelevant to the determination of whether a taking has occurred. See *Troy Ltd v. Renna*, 727 F.2d 287, 300 (3rd Cir. 1984). Whether compensation is adequate is an inquiry separate from whether there has been a taking. In *Loretto*, for example, state law provided for compensation. The Court nevertheless determined that there was a taking through physical occupation. It left it to the state courts to determine whether the compensation provided was adequate." 833 F.2d at 1278.

This Court should not follow the analysis of the *Yee* majority.

E. There Is No Other Compelling Precedent Which Supports or Is Analogous to *Yee*.

The decisions relied upon by the Respondent, City of Escondido, are similarly inapplicable as simply not dealing with the unique taking issue present in *Yee*. No case cited by the Respondent either within the Federal circuits, or those of states outside of California, is apposite to the decisions of *Hall, Pinewood Estates*, and

Azul Pacifico, where the courts uniformly held that a physical taking occurred resulting from the dual effect of state or local tenancy protection acts and local rent control.

In *Eamiello v. Liberty Mobile Home Sales, Inc.*, 208 Conn 620, 546 A.2d 805 (1988), the Supreme Court of Connecticut reviewed the constitutionality of a portion of the State Tenancy Protection Act. The court did not review a combination of two enactments, as in *Yee*, and in fact, no aspect of rent control was before the court. "We conclude that the statute does not unduly harm the economic interest of mobile home park owners. Unlike the ordinance in *Hall v. Santa Barbara*, our statute does not provide for rent control and limit the owner to a below market income." 208 Conn. at 649, 546 A.2d at 819-820.

Although the Connecticut statute allowed a mobile-home tenant to transfer possession to a subsequent tenant, the unique facts raised in *Yee*, i.e., that the rent regulation transferred a premium to the value of the mobile home park being sold, which allows the tenant to collect money for his possessory interest, could not and did not occur. Notably, *Eamiello* was limited to review of a singular statute, not the combination of two laws, working in a manner to create the inverse taking.

Similarly, in the case of *Thompson v. Merlino Enterprises, Inc.*, 208 Conn. 656, 545 A.2d 1094 (1988), dismissed for want of substantial federal question, 488 U.S. 1024, 109 S.Ct. 829, 102 L.Ed.2d 962 (1989), the Connecticut Supreme Court reviewed the right of an Administrator of an estate to sell a mobile home in place to a qualified new tenant. Citing *Eamiello v. Liberty Mobile Homes Sales, Inc.* as precedent (argued on the same day), the court found no taking had occurred simply because an administrator of the tenant could decide who the new tenant would be. *Id.*

While both *Eamiello* and *Thompson* stand for the proposition that a mobile home tenant may select a successor tenant, without constitutional deprivation, none of the considerations initially present before the *Hall* court, or now in *Yee*, were present before the Connecticut Supreme Court. The locational value of the scarce mobile home space has not been transferred to the tenant in those cases, because the landlord can still collect that as part of the new rent he charges to the incoming tenant.

Judge Kozinski, in the recent decision of *Azul Pacifico*, considered the differences of these cases:

> The city argues that our case is just like *Florida Power* because the mobile home tenants and park owners enter into lease agreements voluntarily. But the Court in *Florida Power* stated: 'We do not decide today what the application of (*Loretto*) would be if the FCC in the future case required utilities, over objection, to *enter into, renew, or refrain from terminating* pole attachment agreements. *Id.* at 251-52 n. 6 (emphasis added). This is the situation here, where the RSO [Rent Stabilization Ordinance], read in conjunction with California's Mobilehome Residency Law, has precisely that effect.
>
> An examination of the three factors the Supreme Court highlighted in *Florida Power* supports this conclusion. First, Azul Pacifico is required to enter into agreements; when a tenant vacates and sells a coach, the park owner *must* rent the pad on which it sits to the purchaser. Cal Civ Code 798.74. Second, the park owner *must* renew the pad rental agreement. *Id.* at 798.55, 798.56. Finally, the park owner *must* refrain from terminating such agreements except in sharply circumscribed circumstances.
>
> Standing alone, these requirements of state law may well be constitutional. See, for example, *Eamiello v. Liberty Mobile Home Sales* (citations omitted). But the district court found that the rent and

vacancy control provisions of the city's ordinance in conjunction with the background state law rules operated to transfer Azul Pacifico's property to its tenants, thus violating the takings clause. Memorandum of Decision at 8-9; see also *Pinewood Estates*, 898 F.2d at 348-49 (considering interaction of state and local laws nearly identical to this case).

In *Hall*, we held that the park owners would have a constitutional right to compensation for the taking of their property if they could prove that the [challenged ordinance] has transferred a possessory interest in their land to each of their tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value. 833 F.2d at 1276. After careful review of all the evidence, the district court in this case found that each of these elements was satisfied. We review its findings for clear error and find none. ___ F.2d at ___ (slip opinion at p. 8).

The *Yee* court did conclude that a landlord had no complaint if the effect of the rent control regulation is to allow the tenant to charge more for his home. What the court did not realize is that the increased price is attributable to the possessory interest in this landlord's land, not the mobile home. That is the transfer of value. That is the taking. The *Yee* majority erroneously failed to recognize this.

Like the California Court in *Yee, supra*, the Respondent attempts to focus merely on the economic transfer due to vacancy control, without considering the accompanying loss of property rights to the landlord which *are* constitutionally protected. There is no doubt here that the "economic transfer" here is the right to sell the valuable possessory interest in a scarce mobile home pad or site. The "economic transfer" is a transfer of an interest in real estate!

Further, citing *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S.Ct. 2035, 2041, 64 L.Ed.2d 741, n. 6 (1980), the *Pinewood Estates* court indicates that this Court ". . . has eschewed a literal interpretation of 'property', instead adopting a more expansive approach:

> The term 'property' as used in the Takings Clause includes the entire group of rights inhering in the citizen's [ownership].' It is not used in the 'vulgar and untechnical sense of the physical thing with respect to which the citizen exercise rights recognized by law. [Instead it] denotes[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . (Citations omitted.) 898 F.2d at 352.

Finally, Respondent, City of Escondido, admonishes the *Pinewood Estates* court for "never considering the public interest in protecting the mobilehome owner's investment" (Respondent's Brief in Opposition to Petition for certiorari, at page 21). Respondent suggests that the *Pinewood Estates* panel's comments about the desirability of "vacancy decontrol" clearly indicated that they were unaware that "mobilehome owners are enclosed within a captive market"; that "park owners have a monopoly" and that "taken collectively the [mobile] homeowners have a greater investment than the [mobile] home park owner."

These concerns were neither ignored, nor ill-considered by the panel in *Pinewood Estates*. An overall reading of the opinion belies the Respondent's assertions. "The fact that our result may have a significant impact on the relationship between tenants and mobile park operators has not escaped our notice. . . ." 898 F.2d at 353. The court could not have been unaware of the significant legislative scheme in New Jersey which affords significant tenancy protection for mobile home park tenants. *N.J.S.A.* 2A:18-61.1, *N.J.S.A.* 46:8C-1, *et*

seq. See also *Metpark, Inc. v. Kensharper*, 206 N.J. Super 151 (Law Div. 1985). The court in *Pinewood Estates* rather was concerned with the substantial intrusion of an owner's property rights.

> "The operation of the Barnegat Ordinance in connection with state law has created valuable *property rights* (emphasis added) for which appellants have not been compensated. Furthermore, if the rather minor intrusion in *Loretto* was deemed a physical invasions then the gross intrusion here must be so classified. This is not a case in which a property owner has simply been told that he cannot do something on his property or the he must use his property in a certain way. The situation is aggravated by the fact that the transfer is accompanied by the payment not to the landlord but to the departing tenant of what amounts to rent for the use of the pad. This 'rent' is for the possessory interest of the landlord. Thus, this is a case where other persons, tenants, have been granted interests in property which property belongs to the appellants, the landlords." *Id.* at 353.

II.

THE ESCONDIDO ORDINANCE PROVISIONS PROVIDING VACANCY CONTROL VIOLATE THE DUE PROCESS CLAUSE.

The rent control ordinance at issue is an improper exercise of the police power in violation of the Due Process Clause. The Fifth Amendment and the Fourteenth Amendment do not prohibit governmental regulation for the public welfare, but do condition the exercise of this governmental power by requiring that the ends sought shall be accomplished by methods consistent with due process. *Nebbia v. People of State of New York*, 291 U.S. 502, 54 S.Ct. 505, 510, 78 L.Ed. 940 (1934). The *Nebbia* Court stated:

> ". . . and the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts. *Nebbia v. State of New York*, supra, 54 S.Ct. at pages 510-511.

At a minimum, the vacancy control provisions must have a "real and substantial relationship" to the purpose of the legislation. This court recently described this standard using language which suggests that there may be a more stringent standard when the legislation under review effects a taking of private property without compensation. In *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), appellants Nollan claimed that the California Coastal Commission violated the Takings Clause of the Fifth Amendment as applied to the States in the Fourteenth Amendment, by issuing a coastal development permit conditioned upon appellants' allowing the public an easement to pass across a portion of their property. The court, noting that uncompensated conveyance by appellants of the easement would violate the Fourteenth Amendment, examined the issue of whether the requirement that the easement be conveyed as a condition for issuance of the land use permit would be permissible. *Nollan v. California Coastal Commission, supra,* at 834, 107 S.Ct. at 3147.

Justice Scalia noted that "[w]e have long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests and does not 'den[y] an owner economically viable use of his

land' ", quoting *Agins v. Tiburon*, 447 U.S. 225, 260, 100 S.Ct. 2128, 2141, 65 L.Ed.2d 106 (1980). *Nollan, supra,* at 834, 107 S.Ct. at 3147. The Court reviewed the purposes for the condition and concluded that the Commission's imposition of the condition in appellants' permit could not be treated as an exercise of its land use power for any of the purposes as advanced by the Commission.

The Escondido Ordinance falls far short of either the "substantial advancing of a legitimate state interest" standard or the "real and substantial relation" test, and thus, constitutes an improper exercise of the municipal police power.

Ordinances establishing rent control presumably have the purpose of providing "affordable" housing to tenants. *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988). As discussed, *supra,* the Escondido Municipal Code and the California Mobilehome Residency Law combine to deprive mobile home park owners of their constitutionally guaranteed private property rights. The California Mobilehome Residency Law prohibits park owners from forcing tenants to remove mobile homes at the time of sale, and requires the owners, subject to financial review, to accept a new tenant to reside in the mobile home purchased by the tenant which remains on the pad. The Escondido Municipal Code prohibits the owner from raising rent except as approved by the Escondido Rental Review Board. At the same time, since there is no right of vacancy decontrol, a departing tenant exacts, at the time of sale, a measurable premium from the purchaser of the home, which amount exceeds the amount paid for mobile homes in parks not subject to rent control, or in excess of Kelley Blue Book prices for mobile homes. See, *Azul Pacifico v. City of Los Angeles,* 740 F.Supp. at 778-779.

The ability of the selling tenant to exact a premium at the time of sale not only fails to have a real and substantial relationship to the object sought and fails to "substantially advance" a legitimate state interest, it undermines that interest. As the court noted in *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 (9th Cir. 1987):

> "If appellants are able to prove their allegations, it would seem that the Santa Barbara ordinance will do little more than give a windfall to current mobile park tenants. If, as appellants allege, the ordinance has resulted in a substantial increase in the market price of mobile homes subject to the ordinance, this may well hinder rather than assist lower income families seeking access to the rental units in mobile park homes (sic)."

The ordinance provisions forbidding rent increases or limiting them when a tenant sells or moves from the park does nothing to protect the continued ability of park residents to afford to maintain residency in such parks. The purpose of protecting tenants in possession from being forced out would be achieved as effectively if the landlord is permitted to raise rents when the tenant moves or sells the mobile home. As long as the tenant is protected for the duration of his or her tenancy, the threat of being uprooted due to prohibitive rents is gone.

The Court of Appeals for the Third Circuit characterized the premium paid by the purchasing tenant as "nothing more than rent for the pad which, depending upon whether the purchase is financed or paid for in cash, the new tenant pays for during his tenancy or in advance". 898 F.2d at 355.

Clearly, the Escondido Ordinance, combined with the California Mobilehome Residency Law, operates to defeat, rather than to "substantially advance" the purpose of the legislation. As such, there is no real and substantial relationship between the legislation and its purpose.

Therefore, the Escondido Ordinance violates the Due Process Clause and is an improper exercise of the Police Power.

CONCLUSION

It must be recognized that no single case heretofore cited by the Respondent has dealt squarely with the issue at hand. Be it *Pennell*, or *Fresh Pond*, or *Florida Power*, or the state cases of *Eamiello* or *Thompson*, these courts have simply not been faced with a state tenancy protection act, on to which there is superimposed local rent control.

As indicated, this is neither singularly a rent control case, nor a case challenging tenancy protection. Rather it deals with what happens when the two are combined. With clarity and distinction the courts in *Hall*, *Pinewood Estates*, and *Azul Pacifico*, have enunciated the proper doctrine and methodology to be applied to a physical taking of property by inverse condemnation. By their careful and deliberate reading of this Court's holdings, they have, under the applicable facts, affirmed the requirement, under the Fifth Amendment, that no person shall ". . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation".

The Manufactured Housing Association in New Jersey, Inc., as Amicus in support of Petitioners, request that this Honorable Court grant the relief requested by said Petitioners.

Respectfully submitted,

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November 27, 1991

APPENDIX

BARNEGAT TOWNSHIP
RENT LEVELING ORDINANCE

§64.2. Determination of Rents.

A. The establishment of rents between a landlord and a tenant to whom this ordinance is applicable shall hereafter be determined by the following provisions:

(1) At the expiration of the tenancy for a mobile home space, no landlord may request or receive any increase in the rental income or additional charges for that mobile home space from any tenant, new or continuing, which is greater than a combination of the following:

(a) Any increased cost to the landlord for utilities.

(b) Any increased cost to the landlord in mobile home space fees or license fee charged by the Township of Barnegat pursuant to any duly adopted ordinance.

(c) Any amount equal to three and one-half percent (3½%) of the previous twelve-month rental income for the mobile home space or the percentage increase in the consumer price index over the twelve-month period ending one hundred twenty (120) days prior to the date of the application for said increase, whichever shall be less.

(2) No new or continuing tenant, at the termination of a tenancy, shall suffer or be caused to pay any rent increase for the mobile home space in any twelve-month period which exceeds the above permitted increase for the twelve-month period.

B. No landlord may request or receive of the tenants any increase in rental income or additional charges except as provided by this section and until such time as the landlord shall have obtained approval in writing from the Rent Leveling Board, as hereinafter established, for said increase. Furthermore, there shall be only one (1) request per landlord per mobile home park for any increase per calendar year, for each of the increases permitted by this section, which request and decision shall be binding upon all tenancies of that particular mobile home park which expire during said calendar year. The landlord shall notify the Rent Leveling Board in writing, at least sixty (60) days prior to the effective date, of any increase proposed pursuant to the provisions of this section. At the same time, a copy of said notice shall be mailed by certified mail, return receipt requested, to any tenant who may be affected by the increase applied for. In the event that a landlord shall submit an application for increase or decrease in rent based upon any of the criteria herein, the Rent Leveling Board shall hold a hearing within sixty (60) days of the submission of the completed application.

C. A tenant may be notified by other than certified mail only if the landlord or his representative shall serve the tenant personally with the notice provided for herein and shall certify such service by affidavit and retain such affidavit in his records. Upon receipt of said notice and where the increase sought is based upon the terms of Subsection A(1)(a) or (c) herein, the Rent Leveling Board shall schedule a hearing on said increase and the landlord shall post, in a conspicuous place in or about the park, a notice of said hearing date at least five (5) days prior to the proposed date of hearing. Where the increase sought is based upon the terms in Subsection A(1)(b) herein, no hearing shall be scheduled and the increase

shall become effective on the date specified in said notice if all other applicable provisions of this ordinance are complied with.

D. In the event that a landlord shall make application for any rent increase hereunder or supply any notice to the Rent Leveling Board or any tenant, said application shall include a certification by the landlord that all information supplied in an application or notice is true or accurate.

(Note: There are other provisions of the ordinance which permit capital improvement increases, tax surcharges and reasonable rate of return increases. The ordinance is clear however. It does not allow any increase upon the sale of a mobile home by an existing tenant.)